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In The

Supreme Court of the United States

October Term, 1997

BANDILA SHIPPING INC.; PALM MARITIME S.A.; and the M/V GRACIOUS, her Engines, Tackle, Apparel, Furniture and Appurtenances, *In Rem*,

Petitioners,

v.

ERICA KAUR GHOTRA and RAVINDER SINGH GHOTRA, minors, by SUSAN GHOTRA, their guardian ad litem; SUSAN GHOTRA, as Administrator of the Estate of KULDIP S. GHOTRA; AMOLAK SINGH GHOTRA, and SARJIT KAUR GHOTRA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. When a maritime claim against a vessel *in rem*, as to which there is no right to a jury trial, is joined in the same action with claims brought at law under the "saving to suitors" clause and within the district court's diversity jurisdiction, do the plaintiffs have a constitutional right to a jury trial of all issues common to the law and maritime claims?

2. Must plaintiffs sacrifice their constitutional right to a jury trial of their law claims under the district court's diversity jurisdiction in order to prosecute their maritime claim against a vessel *in rem*.

LIST OF ALL PARTIES

As set forth in their conditional cross-petition for writ of certiorari, respondents/conditional cross-petitioners Erica Kaur Ghotra and Ravinder Singh Ghotra are individuals and minor children. Respondent/conditional cross-petitioner Susan Ghotra is their guardian ad litem, an individual of the age of majority, and the administratrix of the estate of Kuldip S. Ghotra.

In the petition for writ of certorari, petitioner/cross-respondent Bandila Shipping Inc. represents that it is incorporated in The Philippines and has no parent or subsidiary companies, and petitioner/cross-respondent Palm Maritime S.A. represents that its parent companies are Nichimen Corporation, Trading House of Japan, and Mar de Gloria S.A.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

On December 16, 1997, this Court called for a response to the petition for writ of certiorari. This response is filed in compliance with that order.

STATUTES INVOLVED

The petition challenges respondents' constitutional right to a jury trial as provided by the Seventh Amendment to the U.S. Constitution.

Seventh Amendment

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Whether the Seventh Amendment right to a jury trial of a law claim survives the joinder of the law claim with a maritime claim involves rules 18(a), 20(a), and 38(a) and (e) of the Federal Rules of Civil Procedure.

Fed. R. Civ. P. 18(a)

> A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against the opposing party.

Fed. R. Civ. P. 20(a)

> All persons (and any vessel, cargo or other property subject to admiralty process in rem)

may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 38

(a) Right preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

. . .

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

RESPONSE TO THE PETITION

There is one reason for denying the petition: The court of appeals was right in reversing and remanding this case for a trial by jury. There are two reasons for granting the petition, set forth below.

I. REASONS FOR GRANTING THE PETITION

A. Affirmance would resolve the circuit conflict and ensure the constitutional right to a jury trial of claims under the courts' diversity jurisdiction.

As the petition argues, there is a conflict in the circuits. The Ninth and Fourth Circuits enforce a plaintiff's constitutional right to a jury trial of law claims[1] brought under the district court's diversity jurisdiction when those claims are joined in the same action with maritime claims to which no jury right attaches.[2] In cases of this type, however, the Fifth Circuit denies the plaintiff's right to a jury trial of her law claims when they are joined with maritime claims.[3] If this Court grants a writ, it can eliminate this circuit conflict by affirming the Ninth Circuit on this important constitutional issue.

The Seventh Amendment jury right applies only to claims at law, not to claims in equity or in admiralty.[4] This Court has held that this constitutional right to a jury prevails when a law claim is joined with an equitable claim.[5] It has not, however, had the occasion to rule that the constitutional jury right prevails when a law claim is joined with a maritime claim.[6] This case permits the

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[1] The term "law claims" denotes claims brought at law, as distinguished from equitable and maritime claims.

[2] Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1057 (9th Cir. 1997); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 154 (4th Cir. 1995).

[3] Durden v. Exxon Corp., 803 F.2d 845 (5th Cir. 1986).

[4] U.S. CONST. amend. VII.

[5] Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).

[6] In 1963, this Court came close to the issue raised by Bandila's petition when it held, in an action that joined a

Court the opportunity to fill this gap and resolve the circuit conflict on this question by affirming the court of appeals below. This conflict in the circuits makes this a certworthy question.[7]

Based on the Fifth Circuit's rule in *Durden*,[8] the district court denied respondents' constitutional right and forced them to a bench trial of the law claims they brought under the court's diversity jurisdiction.[9] Although respondents' decedent died more than six years ago, respondents have not yet had the opportunity to exercise their Seventh Amendment right. Given the conflict in the circuits and the absence of a definitive ruling by this Court, uncertainty remains about whether plaintiffs who were injured, or whose decedents were killed, aboard or in connection with vessels on the navigable waters of the United States will be allowed to exercise their constitutional jury right when they join their law claims under the "saving to suitors" clause[10] with their maritime lien claim against the vessel.

A grant of certiorari need not entail full briefing and oral argument. This Court already has done the analysis. In cases involving the joinder of equity claims with law

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maritime claim with a Jones Act claim, that both claims would be tried to a jury because the Jones Act, 46 U.S.C. § 688 (1994), declared a jury right. Fitzgerald v. United States Lines Co., 374 U.S. 16, 21 (1963). This Court has not addressed the question presented by Bandila's petition: whether a maritime claim joined with an at-law claim must be tried to a jury if the plaintiff makes a proper jury demand.

[7] Sup. Ct. R. 10(a).

[8] 803 F.2d 845.

[9] 113 F.3d at 1053.

[10] 28 U.S.C. § 1333(1) (1994).

claims, the Court has held that the constitutional right to try the law claims to a jury is not denied because of the joinder of a nonjury equitable claim.[11] In a case involving the joinder of a maritime claim with a statutory claim that carried with it a right to a jury trial, this Court explained that the statutory jury right is not defeated by the joinder with a nonjury maritime claim.[12] Since claims in equity are no more entitled to jury trial than admiralty and maritime claims, the rule of *Beacon Theatres*[13] can easily be applied to the present case. Similarly, *Fitzgerald*'s[14] holding that a statutory jury right survives joinder of the statutory claim with a maritime claim can easily be applied when, as here, the source of the jury right is not an act of Congress but the U.S. Constitution.

Owing to these existing opinions, this appears to be one of those rare certworthy questions on which a summary affirmance is both possible and appropriate.[15] Moreover, because of the conflict in the circuits, a summary affirmance would be more appropriate than a cert denial.

B. Granting the writ would permit this Court to reach the important constitutional and federal questions presented by respondents' conditional cross-petition.

Although the court of appeals was correct in remanding this case for a new trial, enabling respondents to

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[11] *Beacon Theatres*, 359 U.S. 500.

[12] *Fitzgerald*, 374 U.S. 16.

[13] 359 U.S. at 510-11.

[14] 374 U.S. at 21.

[15] Sup. Ct. R. 16.1.

exercise their constitutional right to try their law claims to a jury, the appellate decision was not free from error. While reversing the district court's denial of respondents' jury right, the Ninth Circuit affirmed the district court's dismissal of respondents' California wrongful death action against petitioners Bandila and Palm.[16] The court of appeals dismissed the state wrongful death claim on a theory of federal preemption. It held that Captain Ghotra was a covered employee under the Longshore & Harbor Workers' Compensation Act ("LHWCA"),[17] and that the LHWCA preempts all state law rights, including respondents' right of action under California's wrongful death statute.[18]

At first blush, this holding might appear correct, especially in the light of this Court's recent preemption ruling in *Yamaha Motor Corp. v. Calhoun*,[19] on which the courts below relied.[20] When one considers that it was undisputed, and the court of appeals fully grasped, that Captain Ghotra was self-employed,[21] having no "employer" but himself, the error of the Ninth Circuit's preemption holding becomes patent. The LHWCA is a federal workers' compensation statute. It preempts state law only in respect of workers who are employees covered by the statutory scheme. As a workers' compensation statute, it depends on, and applies solely to,

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[16] 113 F.3d at 1060.

[17] 33 U.S.C. §§ 901-933 (1994).

[18] *Id.* at 1058-59.

[19] 516 U.S. 199 (1996).

[20] 113 F.3d at 1053, 1060 (citing *Yamaha*).

[21] *Id.* at 1059.

employment relationships.[22] It does not cover, nor in any way affect, the self-employed. State law is deemed preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[23] The remedy afforded by California's wrongful death action hardly thwarts the LHWCA, for the latter provides no remedy at all, nor does it even apply, to the self-employed.

The conditional cross-petition asks whether a self-employed marine surveyor is a "covered employee" under the LHWCA for purposes of the "seafarer" test that this Court announced in *Yamaha*.[24] It also asks whether the LHWCA preempts state wrongful death remedies that otherwise would be available to the survivors of a self-employed maritime worker.[25] These are questions of importance not only to respondents, but to all self-employed maritime workers. If the Ninth Circuit's preemption ruling is allowed to stand, every self-employed maritime worker who claims injury on the job, and the survivors of every self-employed maritime worker killed on the job, will fall into the limbo to which the court of appeals assigned respondents: no state law remedy because the LHWCA preempts; no LHWCA remedy because the Act does not cover the self-employed.

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[22] Crowell v. Benson, 285 U.S. 22, 54, 56 (1932).

[23] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[24] 516 U.S. 199, 116 S. Ct. at 623 n.2.

[25] Respondents' Conditional Cross-Petition for Writ of Certiorari, No. 97-758, at i.

C. Summary: A grant of certiorari would allow the Court to right two unconstitutional wrongs.

This case permits the Court to address two constitutional questions of widespread significance. One question affects all persons who will ever have a claim for wrongful death or personal injury involving a vessel and occurring anywhere on the navigable waters of the United States. Must they relinquish their maritime lien against the vessel in order to exercise their Seventh Amendment jury right under the "saving to suitors" clause?[26]

The other question affects whether the survivors of self-employed persons who are killed on a maritime situs will be allowed to bring state wrongful death claims, or whether those claims will be deemed preempted by a federal statute that provides no remedy.

Petitioners and the Fifth Circuit would force plaintiffs to make a mutually exclusive choice between their right to a jury trial against corporate defendants under the "saving to suitors" clause and their right to prosecute their maritime lien against the vessel under the court's admiralty and maritime jurisdiction. This Court can resolve the first question by affirming the Ninth Circuit's view that law claims brought in diversity may be tried to a jury although joined in the same suit with a claim sounding in admiralty. As to the second question – raised by the conditional cross-petition – this Court can establish that the LHWCA[27] does not preempt state laws applying to self-employed maritime workers because it does not afford a federal remedy in exchange. This Court can resolve the second question by rejecting the Ninth

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[26] 28 U.S.C. § 1333(1).

[27] 33 U.S.C. §§ 901-933.

Circuit's notion of an empty preemption that leaves self-employed maritime workers with neither state nor federal remedies.

II. REASONS FOR AFFIRMING THE REMAND FOR A JURY TRIAL

A. Respondents have a maritime lien against the ship on which decedent died and law claims under the "saving to suitors" clause against Bandila and Palm.

The laws of the United States and those of California provided respondents with various causes of action for damages arising from Captain Ghotra's death aboard the M/V GRACIOUS. Because it occurred on an oceangoing vessel moored to a dock in Los Angeles, the death of Captain Ghotra created a maritime lien against the ship.[28] Because it occurred on the navigable waters of the United States, Captain Ghotra's death offered respondents the option of bringing their claims against the corporate petitioners in the form of admiralty and maritime claims within the district court's admiralty jurisdiction.[29] Under the "saving to suitors" clause,[30] respondents were entitled, alternatively, to bring their claims against Bandila and Palm under California law, and they could do this

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[28] The BARNSTABLE, 181 U.S. 464, 467 (1901); Merchants Nat'l Bank of Mobile v. Dredge GENERAL G.L. GILLESPIE, 663 F.2d 1338, 1347 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982).

[29] 28 U.S.C. § 1333(1); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 359-60 (1962); Wilmington Trust v. United States Dist. Court for D. Hawaii, 934 F.2d 1026, 1029 (9th Cir. 1991), *cert. denied sub nom.* Connecticut Bank & Trust Co. v. Wilmington Trust Co., 503 U.S. 966 (1992).

[30] 28 U.S.C. § 1333(1).

either in a California court or under the district court's diversity jurisdiction.[31] Whether they elected to bring their "saving to suitors" claims in state court or as diversity claims in federal court, respondents were guaranteed, by the Seventh Amendment to the Constitution, the right to try them to a jury.[32]

Respondents could pursue their maritime lien against the M/V GRACIOUS only in the district court,[33] which has original and exclusive jurisdiction of admiralty and maritime claims.[34] To exercise their right to proceed against the ship, respondents chose to bring their law claims against the corporate petitioners in the district court as well. To secure their constitutional right to a jury trial of their law claims against Bandila and Palm, respondents brought those claims as state law claims under the "saving to suitors" clause,[35] invoking the district court's diversity jurisdiction.[36] Respondents joined their maritime claim against the M/V GRACIOUS *in rem* under the court's admiralty jurisdiction.[37]

Petitioners convinced the district court that the joinder of the maritime claim against the M/V GRACIOUS *in rem* had the effect of negating respondents' constitutional right to try their diversity claims to a jury. The court struck respondents' timely jury demand, and the "saving

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[31] 28 U.S.C. § 1332.

[32] U.S. CONST. amend. VII.

[33] Powell v. Offshore Navigation, Inc., 644 F.2d 1063, 1065 n.3 (5th Cir.), *cert. denied*, 454 U.S. 972 (1981).

[34] 28 U.S.C. § 1333(1).

[35] *Id.*

[36] 28 U.S.C. § 1332.

[37] 28 U.S.C. § 1333(1).

to suitors" claims were tried to the court.[38] On appeal, the Ninth Circuit ruled that the joinder of a maritime claim against the ship did not destroy respondents' right to a jury trial of the claims brought under the court's diversity jurisdiction.[39] Accordingly, the court of appeals reversed and vacated the judgment, and remanded for a new trial to a jury, in keeping with the Seventh Amendment.[40] The Ninth Circuit's ruling is correct.

B. The Fifth Circuit's holding that there is no right to a jury trial of diversity claims joined with a maritime claim is unconstitutional.

In *Durden v. Exxon Corp.*,[41] the Fifth Circuit held that the right to try diversity claims to a jury is forfeited when such claims are joined with a maritime claim. In *Durden*, the plaintiff filed a Jones Act claim, which carried with it the statutory right to a jury trial.[42] Before trial, Durden compromised his claim against his Jones Act employer. When the plaintiff rested his case at trial, the employer moved for a directed verdict on the Jones Act claim, and the court granted the motion. The court then dismissed the jury and entered judgment for the defendants, dismissing the plaintiff's *in personam* claims against the corporate defendants and exonerating the ship, the M/V SANKO PRESTIGE, which Durden had sued *in rem*.[43]

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[38] 113 F.3d at 1053.

[39] *Id.* at 1056-58.

[40] *Id.* at 1058.

[41] 803 F.2d 845.

[42] 46 U.S.C. § 688.

[43] 803 F.2d at 846.

Durden appealed the court's dismissal of the jury, contending that he was entitled to a jury trial against the corporate defendants. The Fifth Circuit affirmed:

> Durden's original complaint alleges jurisdiction under "Title 28 § 1332 [the diversity provision] of the United States Code and/or the General Maritime Law of the United States". He also requested a jury trial. But he brought this action against the vessel *in rem*, "invoking the unique power of the admiralty court." Such an action falls "within the exclusive admiralty jurisdiction and could not be brought under diversity jurisdiction".[44]

Holding that the joinder of an admiralty and maritime claim against the M/V SANKO PRESTIGE defeated Durden's right to a jury trial of his diversity claims against the corporate defendants, the Fifth Circuit undeniably viewed the suit as one that must be tried, in its entirety, either to the court or to a jury. Concluding that it could not permit a jury trial of Durden's maritime claim against the ship, the panel ruled that the assertion of his maritime claim defeated Durden's right to a jury trial of his diversity claims.

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[44] *Id.* at 849. The other Fifth Circuit cases cited in the petition are inapposite: T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983), and Gilmore v. Waterman S.S. Corp., 790 F.2d 1244 (5th Cir. 1986). In both cases, the court of appeals determined that the plaintiff had pleaded its claim under both the diversity and the admiralty jurisdiction of the court. This, in the court's view, was effectively an election under FED. R. CIV. P. 9(h), and such an election rendered the claim, in each case, an admiralty and maritime claim rather than a law claim. *T.N.T. Marine*, 702 F.2d at 588; *Gilmore*, 790 F.2d at 1246.

In this the Fifth Circuit was wrong. First, the court of appeals failed to distinguish between the absence of a right to a jury trial and the prohibition of such a trial. Second, it failed to distinguish between corporate defendants sued *in personam* and a defendant vessel sued *in rem*. Third, it overlooked the logical consequences of its own dictum that: "Had the district court not dismissed that [Jones Act] claim, Durden could have presented it *and his related maritime claims* to a jury."[45] This is a correct statement of the law, but the *Durden* panel missed the underlying legal principle. If a plaintiff has a right to try a particular claim to a jury, he does not forfeit his right merely by joining a maritime claim in the same action. Though the rule that there is no right to a jury trial of maritime claims must bow to an act of Congress, is it really true that the maritime rule trumps the Constitution?

C. Although there is no "right" to a jury trial in admiralty, jury trials are not prohibited.

Jury trials in admiralty are not prohibited. Though the Seventh Amendment right to a jury trial extends only to cases sounding in law,[46] nothing *prohibits* trying a maritime claim to a jury. Federal Rule of Civil Procedure 38, entitled "Jury Trial of Right," provides:

> **(a) Right preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
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> . . .

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[45] 803 F.2d at 848 (emphasis added).

[46] U.S. CONST. amend. VII.

> **(e) Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).[47]

This Court has held that when law claims and equitable claims are joined in the same action, the plaintiff is entitled to a jury trial of all the issues that the two claims have in common.[48] This Court has also held that a maritime claim joined with a Jones Act claim must be tried to a jury because the Jones Act declares a jury right.[49] These holdings indicate that the *absence of a right* to try equitable and admiralty claims to a jury is not a *prohibition* against juries deciding issues of fact which a law claim has in common with an equitable or admiralty claim.

Petitioners argue that this Court's ruling in *Fitzgerald* was subsequently limited by Congress to cases in which an admiralty and maritime claim is joined with a statutory claim that provides a right to a jury trial.[50] The petition rather incongruously asserts that admiralty and maritime claims may be tried to a jury when they are joined with a claim under the Jones Act – because the Jones Act provides a right to jury trial[51] – but not when joined with a law claim for which the Constitution guarantees a right to a jury trial. In petitioners' scheme of

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[47] FED. R. CIV. P. 38.

[48] Lytle v. Household Mfg. Co., 494 U.S. 545, 550 (1990); Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974); *Beacon Theatres*, 359 U.S. 500.

[49] *Fitzgerald*, 374 U.S. at 21 (citing the Jones Act, 46 U.S.C. § 688).

[50] Bandila's Petition at 14.

[51] 46 U.S.C. § 688.

things, a constitutional guaranty does not rise to the level of a statute.[52]

D. Respondents' law claims are against different defendants than their maritime lien claim against the vessel.

The petition depends on the implicit assumption that there is an identity between respondents' claims against the corporate defendants and their claims against the ship. These claims, however, are not identical. They are separate claims against different entities. The M/V GRACIOUS is a ship. Bandila and Palm are corporations. Just as each corporation is distinct from the ship, each also is distinct from the other. In the "Parties' Disclosure Statement," Bandila states that it is incorporated in The Philippines and has no parent or subsidiary companies; Palm does not reveal the place of its incorporation, but claims the parentage of "Nichimen Corporation, Trading House in Japan, and Mar de Gloria S.A."[53] Bandila and Palm are distinct and separate juristic persons. So is the ship.

The idea that a nonsentient object – the M/V GRACIOUS – can have legal capacity is, to say the least, sophisticated. Yet the concept of *vessel as juristic person* is one of the underpinnings of the admiralty law in this country, and is as old as the Constitution. In the admiralty, a vessel is a juristic person and may be sued as such and adjudged liable whether her owner is liable or not. A

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[52] *Compare* FED. R. CIV. P. 38(a), which preserves "inviolate" the right to a jury trial when it is declared either by a statute, such as the Jones Act, or by the Seventh Amendment to the Constitution.

[53] Bandila's Petition at ii.

vessel's *in rem* liability for personal injury or the loss of life or cargo arises from the fact that the loss or injury occurred aboard, or through the instrumentality of, the ship. The loss gives rise to a maritime lien. There is but one way to assert the lien: by proceeding in the district court against the vessel *in rem*, as provided by this Court's Supplemental Rules for Certain Admiralty and Maritime Claims.[54] The lien may not be enforced otherwise, or against any party but the vessel. Judgment may issue only from the district court, and only against the ship, and may be enforced only against the ship or such security as has been substituted for her. Hence the "personification" of the vessel – her recognition as a juristic person notwithstanding that she is inanimate property.

The ship's liability derives from her involvement in the tortious conduct or breach of contract of persons in lawful possession,[55] as well as of others not so lawful.[56] If the shipowner breaches a tort or contractual duty in which the vessel is involved, such as colliding negligently with another ship, failing to operate the hatch covers safely, or failing to deliver cargo in the same condition in

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[54] FED. R. CIV. P. SUPP. R. A & C; Pioneer Import Corp. v. The LAFCOMO, 49 F. Supp. 559 (S.D.N.Y.), *aff'd*, 138 F.2d 907 (2d Cir. 1943), *cert. denied sub nom.* Black Diamond Lines v. Pioneer Import Corp., 321 U.S. 766 (1944).

[55] Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224-25 (1945); Churchill v. F/V FJORD, 892 F.2d 763 (9th Cir. 1988), *cert. denied*, 497 U.S. 1025 (1990), *appeal after remand*, 5 F.3d 374 (9th Cir. 1993). As an example, the Federal Maritime Lien Act, 46 U.S.C. §§ 31341-31343 (1994), provides for the creation of a lien against a vessel for the furnishment of necessaries authorized by the ship's agent, owner or operator.

[56] The JOHN G. STEVENS, 170 U.S. 113, 121 (1898).

which it was received, then the vessel will be liable *in rem* for the owner's breach.

The owner need not be liable *in personam* for the vessel to become liable *in rem*.[57] There are breaches of duty for which a vessel will be liable and her owner not. If the owner charters the ship to another, the charterer's breach of duty will visit liability upon the ship, though not upon the owner.[58] Congress recognizes that the carrier and the ship are separate juristic persons, and imposes statutory responsibilities and liabilities upon the "ship" as well as upon the carrier.[59]

Maritime liens follow the ship into new ownership. The vessel remains exposed to *in rem* liability despite the absence of fault in her new owner. Maritime liens remain with the vessel until they are extinguished by suit *in rem*, by laches, or by judicial sale.[60]

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[57] Cavcar Co. v. M/V SUZDAL, 723 F.2d 1096, 1101 (3d Cir. 1983); Dredge GENERAL G.L. GILLESPIE, 663 F.2d at 1346.

[58] For example, if a charterer who is a carrier within the meaning of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1994), is liable for loss of or damage to goods in its possession, the ship will be liable as well. But the shipowner will be liable only if it is found to have carrier status by having signed or ratified the charterer's bill of lading. If the owner is not a carrier, it will not be liable for the cargo loss, but its ship will nevertheless be liable. *M/V SUZDAL*, 723 F.2d at 1101.

[59] *See* 46 U.S.C. §§ 1303, 1304 (1994).

[60] If a ship is sold by judicial sale, all liens not filed in the proceeding will be extinguished by the sale. Gulf Oil Trading Co. v. Creole Supply, 596 F.2d 515, 521 (2d Cir. 1979); Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co., 261 F.2d 861, 866 (5th Cir. 1958). On the other hand, a ship sold privately or by a court that does not have actual possession of her will not be freed of liens, and the new owner may find its vessel arrested

That a ship can be liable *in rem* without corresponding *in personam* liability in her owner demonstrates that admiralty law for centuries has personified the vessel and viewed her as a juristic entity.

> Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court.[61]

The historical treatment of the ship and her owner as distinct and separate juristic entities informs Chief Justice Marshall's summation of the law governing a vessel declared forfeit for making a prohibited call in a foreign port:

> 'This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner.'[62]

Justice Story, who was often this Court's voice on matters of admiralty law, explained the personification of the vessel in these words:

> 'The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offence be malum prohibitum or malum in se.

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on the basis of a presale lien. Moran v. Sturges, 154 U.S. 256, 285 (1894); Thorsteinsson v. M/V DRANGUR, 891 F.2d 1547, 1553 (11th Cir. 1990).

[61] *Canadian Aviator*, 324 U.S. at 224 (citations omitted).

[62] The JOHN G. STEVENS, 170 U.S. at 121 (quoting Marshall, C.J., in The LITTLE CHARLES, 1 Brock. 347, 354, Fed. Cas. No. 15,612).

> The same principle applies to proceedings in rem on seizures in the admiralty.'[63]

The ship can be liable notwithstanding her owner's innocence:

> 'It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which and by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof.'[64]

As this Court's opinions reflect, the law regards the vessel as the offender, regardless of whether her owner, too, was at fault. When a maritime lien is born of liability, the defendant charged with that liability is the vessel *in rem* and not her owner. Viewed in this its proper context, the claim brought by the Ghotras against the M/V GRACIOUS *in rem* is a different claim, brought against a different juristic person, than the Ghotras' state law claims against the corporate petitioners, Bandila and Palm. A maritime lien against the ship, arising from Captain Ghotra's death on board, is the basis for the Ghotras' claim against the M/V GRACIOUS.

To perfect that lien, to pursue recovery in the only way permitted by the maritime law under which the lien arose, the Ghotras had to sue the ship *in rem* and procure her arrest under Supplemental Rule C.[65] Otherwise, they would have waived their claim against the ship. Plaintiffs

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[63] *Id.* (quoting The PALMYRA, 25 U.S. (12 Wheat.) 1, 14 (1827)).

[64] *Id.* (quoting The MALEK ADHEL, 43 U.S. (2 How.) 210, 233-34 (1844)).

[65] FED. R. CIV. P. SUPP. R. C.

should not be required to forfeit their constitutional right to a jury trial of law claims simply because they did what must be done to pursue an *in rem* maritime claim, particularly when the law claims lie against different juristic persons than the maritime claim.

E. The Federal Rules of Civil Procedure provide expressly for the joinder of claims arising in different departments of the federal courts.

Petitioners claim that the merger of the law and admiralty departments of the federal courts, achieved through the unification in 1966 of the procedural rules for civil and admiralty cases, reflects the continued distinction between jury trials in the civil law and bench trials in the admiralty.[66] Petitioners quote from the advisory committee notes to rule 9(h) to hammer home their view that the unification of the civil and admiralty departments was not meant to extend maritime arrest and attachment procedures to civil claims, or jury trials to admiralty ones.[67]

Far from supporting petitioners or the Fifth Circuit, the unification of the civil and admiralty sides of the courts substantiates the Ninth Circuit's ruling that respondents are entitled to a jury trial of their law claims. Thanks to the unification, the district court, in one and the same suit, can entertain both a civil claim under the "saving to suitors" clause,[68] which is brought under its diversity jurisdiction against corporate defendants, *and*

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[66] Bandila's Petition at 10-13.

[67] *Id.* at 12 (quoting FED. R. CIV. P. 9, advisory committee's notes, 1966 amend.).

[68] 28 U.S.C. § 1333(1).

an admiralty and maritime claim, brought under its admiralty jurisdiction against a vessel *in rem* utilizing maritime arrest procedures. The unified Federal Rules of Civil Procedure apply to both civil and maritime claims.

That these rules apply to both respondents' maritime claim against the M/V GRACIOUS and their diversity claims against Palm and Bandila appears from the language of the rules. Rule 18 contemplates the joinder of claims arising in different departments of the district court:

> A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, *legal, equitable, or maritime,* as the party has against the opposing party.[69]

Since rule 18 would permit a party to join a diversity claim with a maritime claim against the same defendant, it follows that respondents may join a diversity claim against one defendant with a maritime claim against another defendant, providing the requirements are met for joinder of claims against different defendants. Those requirements appear in rule 20:

> All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief *in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action.*[70]

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[69] FED. R. CIV. P. 18(a) (emphasis added).

[70] FED. R. CIV. P. 20(a) (emphasis added).

The language of rule 20 plainly permits the joinder of claims against persons (*in personam* claims) with claims against a vessel *in rem*. As if there could be any doubt about what this language means, the Advisory Committee explained: "A basic purpose of unification of admiralty and civil procedure is *to reduce the barriers to joinder;* hence the reference to 'any vessel,' etc."[71] It would have been treacherous indeed if, in reducing the barriers to joinder and inviting plaintiffs to join their law and maritime claims in a single action, the advisory committee had devised to rob plaintiffs of their constitutional right to try their law claims to a jury.

The Fourth Circuit, in a pellucid opinion written two years before *Ghotra*, held that the federal joinder rules do actually allow a plaintiff to join together in a single action several claims which, in former times, must have been brought in separate departments of the district court. In *Vodusek v. Bayliner Marine Corp.*,[72] the Fourth Circuit considered whether a jury trial was proper when a claim at law, relying on diversity jurisdiction, was joined with a claim in admiralty. The court concluded that these claims by the survivor and estate of a boater who died from burns suffered in an explosion and fire aboard his boat were properly tried to a jury: "Federal courts are authorized, *in one civil action*, to exercise several types of subject matter jurisdiction historically exercised by separate courts, including courts of law, equity, and admiralty."[73]

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[71] *Id.*, advisory committee's note, 1966 amend. (emphasis added).

[72] 71 F.3d 148 (4th Cir. 1995).

[73] *Id.* at 152 (citing U.S. CONST. art. III, § 2, and FED. R. CIV. P. 1).

The Seventh Amendment, said the court, entitles the plaintiff to a jury trial of her diversity claim. "When a civil action involves claims that historically would have been tried in different courts and a jury trial is demanded,"[74] a single trial to a jury should be had for both the law claim brought in diversity and the maritime claim to which no jury right attaches.[75] Applying this Court's reasoning in *Fitzgerald*[76] that the jury right prevails, the Fourth Circuit concluded "that when the accident and injuries underlying the plaintiff's law and admiralty damage claims are the same, the considerations underlying the pragmatic rule of *Fitzgerald* dictate its application, even when the plaintiff had named different defendants in those claims."[77]

The maritime claim in *Vodusek* was an *in personam* one against the boat dealer, not an *in rem* claim against the boat. It remains for this Court to add the final piece to the puzzle, to finish the work begun in *Beacon Theatres*[78] and *Fitzgerald*,[79] by ruling that the joinder of a maritime lien claim against a vessel *in rem* does not deprive a plaintiff of her constitutional right to try her law claim to a jury.

F. The constitutional right to a jury trial is not compromised by the joinder of a nonjury claim.

The legal principle questioned by the petition has already been resolved in the context of equitable claims.

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[74] *Id.* at 153.

[75] *Id.* (citing *Fitzgerald*, 374 U.S. at 21).

[76] 374 U.S. at 21.

[77] 71 F.3d at 154 (citing *Fitzgerald*, 374 U.S. at 21).

[78] 359 U.S. 500.

[79] 374 U.S. 16.

Nearly 40 years ago, this Court determined that the constitutional right to a jury would be observed when the law claim to which that right attached is joined in the same action as a claim in equity for which there is no jury right.[80]

When the constitutional right to try a law claim to a jury conflicted with the absence of a jury right for an equitable claim, this Court held that the constitutional right must prevail:

> Since the right to a jury trial is a constitutional one, . . . while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. As this Court said in Scott v. Neely, 140 U.S. 106, 109-110: "In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency." This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.[81]

The continued vitality of this rule is seen in the Court's recent discussion of the issue in *Lytle v. Household Mfg. Co.*[82] There the Court observed: "When legal and

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[80] *Beacon Theatres*, 359 U.S. 500.

[81] *Id.* at 510-11.

[82] 494 U.S. 545 (1990).

equitable claims are joined in the same action, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.' "[83] *Lytle* refers to "this Court's approach in cases involving a wrongful denial of a petitioner's right to a jury trial on legal issues."[84] Noting that its ruling would require a new trial, the Court explained that relitigation was "essential to vindicating Lytle's Seventh Amendment rights. . . . [R]elitigation is the only mechanism that can completely correct the error of the court below."[85]

This Court's conviction that the constitutional right to a jury trial of law claims must be secured, even when those claims are joined with nonjury equitable claims, indicates that the Ninth Circuit ruled correctly on the question presented for review. The strength of this conviction suggests that the most appropriate action on this petition would be to affirm the court below and overrule the Fifth Circuit's conflicting rule.

III. The Ghotras' California wrongful death claim is not preempted by the LHWCA, and they are entitled to try that claim to a jury.

Even as it restored the Ghotras' Seventh Amendment right to a jury trial of their law claims against Bandila and Palm, the Ninth Circuit, through faulty application of the supremacy clause of the Constitution,[86] denied the Ghotras the right to sue Bandila and Palm for wrongful

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[83] *Id.* at 550 (quoting *Curtis*, 415 U.S. at 196 n.11).

[84] *Id.* at 552.

[85] *Id.* at 553.

[86] U.S. CONST. art. VI, cl. 2.

death.[87] The court of appeals held that Captain Ghotra, though self-employed, was a covered employee under the LHWCA[88] and, as such, a "seafarer" under *Yamaha*.[89] Opining that self-employed marine surveyors such as Captain Ghotra are just the kind of persons Congress meant to bring within the scope of federal workers' compensation,[90] the Ninth Circuit refused to recognize that the LHWCA does not actually cover the self-employed:

> We do not disagree that the requirement of a "master-servant" relationship may be necessary to justify liability without fault against a putative employer. However, the fact that Captain Ghotra is unable to recover against an employer under the instant circumstances does not take him out of the scope of the LHWCA.[91]

By this circuitous reasoning, the Ninth Circuit held that a federal workers' compensation statute which provides no compensation to self-employed maritime workers such as Captain Ghotra nevertheless preempts their state law rights. The court below thus announced the dubious legal principle that a federal remedy preempts state remedies even when the state remedies are outside the field of the federal remedy and do not conflict with it. Although the LHWCA only partially preempts

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[87] *Ghotra*, 113 F.3d at 1059.

[88] 33 U.S.C. §§ 901-933 .

[89] 516 U.S. 199, 116 S. Ct. at 623 n2.

[90] 113 F.3d at 1059.

[91] *Id.*

the field by limiting itself to maritime employment relationships,[92] the Ninth Circuit decided that the preemption applies to all maritime workers, even the self-employed.[93]

CONCLUSION

1. The Ninth Circuit's remand for a new trial, enforcing respondents' constitutional right to try their law claims to a jury, should be affirmed.

By granting the petition and affirming on the jury question, the Court can achieve three important results. First, it can resolve a conflict in the circuits by overruling the Fifth Circuit's contradictory view that the Seventh Amendment jury right is lost when a law claim is joined with a maritime claim. Second, it can complete the work (begun in *Beacon Theatres*[94]) of ruling that the constitutional right to a jury trial survives the joinder of law claims with claims arising in other departments of the federal courts (equity and admiralty) in which there is no jury right. Third, the Court can explain how the joinder procedure set out in federal rules 18 and 20 interacts with the jury procedure described in federal rules 38 and 39 to permit a jury trial of law claims joined with claims arising in admiralty or equity. By overruling the Fifth Circuit's

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[92] *Crowell*, 285 U.S. at 54, 56.

[93] *See* Ghotras' Conditional Cross-Petition, No. 97-758, at 8-13.

[94] *Beacon Theatres*, 359 U.S. 500.

approach, an affirmance would mean that future plaintiffs will not risk the possible forfeiture of their constitutional right to a jury trial of their law claims by forthrightly prosecuting their maritime lien claims against offending vessels.

2. The Ninth Circuit's ruling that respondents' California wrongful death action is preempted by the LHWCA should be reversed.

By granting the petition, the Court can consider the questions presented by respondents' conditional cross-petition: (1) Are the self-employed covered by the LHWCA?[95] (2) Does the LHWCA preempt state law remedies although it provides the self-employed no remedy in return? By reversing the court of appeals on the questions presented by the conditional cross-petition, this Court can resolve important questions of constitutional and statutory law, ensuring that the self-employed and their survivors will not be left without a remedy for injury or wrongful death in the manner envisaged by the Ninth Circuit.

3. Summary disposition on the merits is appropriate.

The grant of a writ need not involve briefing and oral argument of the jury trial question presented by the petition. This Court's opinions in *Beacon Theatres*[96] and *Lytle*[97] have made clear that the constitutional right to a jury trial of law claims is preserved inviolate despite their

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[95] 33 U.S.C. §§ 901-933.

[96] 359 U.S. 500.

[97] 494 U.S. 545.

joinder with claims brought in equity. Since admiralty claims, like equity claims, are tried to the court, not to a jury, this Court need only replace the word "equity" with "admiralty" to resolve the circuit conflict. The reasoning and constitutional principle applied to the joinder of law and equity claims applies with equal force to the joinder of law and admiralty claims. Thus, summary affirmance is entirely appropriate for review of the question presented by the petition.[98] The effect of joining a maritime claim on the constitutional right to a jury trial of a law claim is addressed adequately in the petition, this response, the opinion of the court of appeals below,[99] the opinions of the Fourth[100] and Fifth Circuits,[101] and this Court's opinions in *Beacon Theatres*,[102] *Lytle*[103] and *Fitzgerald*.[104]

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Respectfully submitted,

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[98] SUP. CT. R. 16.1.

[99] *Ghotra*, 113 F.3d 1050.

[100] *Vodusek*, 71 F.3d 148.

[101] *Durden*, 803 F.2d 845.

[102] 359 U.S. 500.

[103] 494 U.S. 545.

[104] 374 U.S. 16.